

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF MISSISSIPPI
EASTERN DIVISION**

MERLIN HILL

PETITIONER

v.

No. 1:10CV022-M-S

STATE OF MISSISSIPPI, et al.

RESPONDENTS

MEMORANDUM OPINION

A. Recusal

This cause is before the court motion for reconsideration filed by the Petitioner on May 9, 2011 following the dismissal of the petition challenging his state court conviction. The Respondents filed a motion to dismiss on June 1, 2010. The Petitioner never responded to the motion. On September 10, 2010, the Magistrate Judge recommended that the habeas petition be dismissed as untimely. Again, the Petitioner never filed any objections to the Recommendation.

District Judge Sharion Aycock adopted the Recommendation as the opinion of the court on October 5, 2010, and the matter was dismissed. On December 16, 2010, a motion for certificate of appealability was denied. May 9, 2011, nearly seven months after the matter was dismissed, the Petitioner filed a motion for reconsideration arguing that Judge Aycock should have recused herself because she, at the time a state court judge, denied his application for state postconviction relief. Despite his procrastination in bringing this fact to the court's attention, the impossibility of overcoming the statute of limitations and that he failed to prove recusal was justified, Judge Aycock recused herself.

B. Motion to Vacate

In light of Judge Aycock's recusal and in the interest of avoiding all appearance of bias or

impropriety, the Final Judgment dated October 5, 2010 shall be vacated.

C. Report and Recommendation

Vacation of the Final Judgment, however, does not save the petition. The well reasoned Recommendation of the Magistrate Judge remains unchanged. The fact is the petition was filed almost eleven years beyond the expiration of the statute of limitations. Once again, the Petitioner does not and cannot dispute the timeliness of his petition.

For this reason the Report and Recommendation shall be adopted as the opinion of the court.

A final judgment in accordance with this opinion will be entered.

THIS the 6th day of June, 2011.

/s/ MICHAEL P. MILLS
CHIEF JUDGE
UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF MISSISSIPPI